

IN THE UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

UNITED STATES OF AMERICA, )

Plaintiff, )

V. ) CASE NO. 3:02-00008

MICHAEL EDWARD SMITH, )

Defendant. )

TRANSCRIPT OF PROCEEDINGS

SENTENCING HEARING

DATE: May 1, 2006

TIME: 1:00 P.M.

BEFORE: HONORABLE WILLIAM J. HAYNES, JR.

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A P P E A R A N C E S:

For the Plaintiff: Ms. Debra Phillips  
Asst. U. S. Attorney  
Nashville, TN

For the Defendant: Mr. Sumter Camp  
Asst. Federal Public Defender  
Nashville, TN

Mr. David Baker  
Attorney at Law  
Nashville, TN

1 P R O C E E D I N G S

2 THE CLERK: We're here for a sentencing hearing in USA  
3 v. Michael Edward Smith. Is counsel ready, please?

4 MS. PHILLIPS: Government present and ready.

5 THE CLERK: Defense counsel?

6 MR. CAMP: Defendant is present and ready, Your Honor

7 THE COURT: For clarity of the record, will counsel  
8 identify themselves by name.

9 MS. PHILLIPS: Debra Phillips for the government.

10 MR. CAMP: Sumter Camp and David Baker for Mr. Smith,  
11 Your Honor.

12 THE COURT: I know who you are, but for clarity of the  
13 record. Are there any preliminary matters before we get  
14 started? Either side?

15 MR. CAMP: No, sir.

16 THE COURT: If not, then from review of the Sixth  
17 Circuit opinion, there appear to be some issues that the Court  
18 needs to address. In footnote two of the opinion, the Court  
19 expressed uncertainty about whether the Court was applying the  
20 2002 guideline range for the 2003 guideline range.

21 Frankly, it's unclear to me, but I don't have the --  
22 the volume I had was the November 5, 2003 volume. The  
23 presentence report was prepared on March 8, 2004. I'm sorry, it  
24 originally was prepared on July, 2003 and then was amended on  
25 March 8, 2004. The sentencing was on March 17, 2004. And the

1 Court usually keeps the most current volume of the sentencing  
2 guidelines at its bench.

3 So, at least from the Court's perspective, in reviewing  
4 arguments, I think in all likelihood I had the November 5, 2003  
5 version at the time of sentencing.

6 There were a number of enhancements that were made, and  
7 I would have had what was on the bench at the time of sentencing  
8 in March of 2004 in deciding those. So, from the Court's  
9 perspective, the Court is of the belief that had before it the  
10 guidelines that were effective November 5, 2003.

11 Now, the Court would first adopt as the basis for  
12 sentencing the statement of facts at the time of the guilty  
13 plea, which are attached to docket entry number 48 at pages 22  
14 through 31. The Court notes particularly that at page 22, it  
15 states that the defendant was, quote, observed pointing a rifle  
16 from a vehicle in the direction of the Sherith Israel school,  
17 end of quote, at page 22.

18 Unless there is some additional proof, the Court is  
19 inclined to adopt and rely upon the transcript of the earlier  
20 proof at sentencing. Are there any exceptions or any additional  
21 proof either side wants to put on?

22 MS. PHILLIPS: Not for the government, Your Honor.

23 MR. CAMP: Judge, we have two documentary items of  
24 proof, but I think they could actually come in at a later point.

25 THE COURT: No, sir, it's coming in now. Whatever

1 proof you've got to submit, it comes in the record now.

2 MR. CAMP: Yes, sir. If I could have just a moment,  
3 Your Honor.

4 Your Honor, I would tender to the Court and I have  
5 provided copies to opposing counsel two documents marked  
6 Defendant's Exhibits 1-A and 1-B. 1-A is a copy of a criminal  
7 complaint in United States v. Ahmed Hassan Al-Uqaily, and 1-B is  
8 a copy of the judgment in that same case, both from this  
9 district and tendered by the defendant as related to --

10 THE COURT: Do you have this, Ms. Phillip?

11 MS. PHILLIPS: Yes, Your Honor. And Your Honor, I  
12 understand the Court can take a look at it for whatever value  
13 the Court gives this, would be appropriate. But I would note  
14 for the record, we would object to this on relevance. The items  
15 that he is submitting have to do with a plea agreement that was  
16 entered into by Al-Uqaily and defense counsel and the  
17 government.

18 There was no plea agreement in this case. There are  
19 substantially different facts. I understand the purpose of this  
20 is to try to balance the two and make it look like one case is  
21 similar to the other. Mr. Al-Uqaily is being deported at the  
22 conclusion of his sentence. It's a much different case. And it  
23 would take days and days to delve into the specific facts.

24 And, therefore, I object to it on those grounds, but I  
25 also understand that the Court can look at it for whatever value

1       it deems it has. But the government would submit that it has no  
2       value in this proceeding.

3               MR. CAMP: Your Honor, we're offering it to go to the  
4       issue of parity or disparity, as the Court knows is one of the  
5       matters that the Court must consider. The complaint in  
6       Al-Uqaily talks about how that defendant actively discussed  
7       harming Jewish people and sought weapons to do just that, was in  
8       the process of trying to buy hand grenades for that purpose.

9               The sentence imposed in that case was 57 months. That  
10      may have been a plea agreement, but a court in this district  
11      accepted that. At an appropriate time, we would distinguish it  
12      from this case.

13              THE COURT: Well, the Court will admit them for the  
14      purposes of what the documents themselves reflect. So  
15      Defendant's Exhibits 1-A and 1-B will be admitted. So I take it  
16      now that the record is now closed as to factual matters?

17              MR. CAMP: Yes, sir, as to the defendant.

18              MS. PHILLIPS: Yes, sir.

19              THE COURT: All right. I would like to discuss this  
20      issue of ex post facto that's raised in the defendant's  
21      sentencing memorandum. As I understand the defendant's  
22      argument, they are arguing that the maximum sentence is the  
23      maximum provided by law -- the maximum provided under the  
24      guidelines at the time of the offense. So have I accurately  
25      stated the defendant's position.

1 MR. CAMP: Yes, sir.

2 THE COURT: All right. So it seems to me, then, that  
3 the 2002 guidelines that were the basis for the presentence  
4 report in this case, as noted by the Sixth Circuit, would be the  
5 appropriate guideline to be used in this case, and, therefore,  
6 would be the basis for at least the Court's initial  
7 determination -- or for use in the Court determining the  
8 appropriate guidelines. The Court, of course, is not bound by  
9 what the probation office has found, and will make appropriate  
10 decisions as to where it does and does not.

11 Now, having said that, it appears to me that sentencing  
12 enhancements were part of the law and part of the guideline law  
13 at the time of the underlying offense. So it doesn't seem to  
14 the Court that to impose the sentencing enhancement in this case  
15 is in any way an ex post facto violation of the law.  
16 But if I'm in error in that regard, I will be pleased to hear  
17 from you.

18 MR. CAMP: May it please the Court, that is a somewhat  
19 unique legal position created by the United States Supreme  
20 Court's decision in United States v. Booker. Backing up, before  
21 we get to that particular case, the Supreme Court has noted that  
22 the ex post facto clause, or principles of ex post facto, apply  
23 to judicial decision-making through the due process clause.  
24 This was established in Bowie v. City of Columbia, the court  
25 citing principles going back to Caulder in 1798 and setting

1       forth the standard in which the Supreme Court has recently  
2       established in *Rodgers v. Tennessee*.

3               THE COURT: Let me be clear. When I referred to the  
4       2002 guidelines, to avoid any issue of ipso facto, or ex post  
5       facto violation, I am treating the 2002 guidelines as consistent  
6       with *Booker*, meaning that they are advisory only. I am not  
7       adopting the state of the law at the time that they were  
8       mandated.

9               MR. CAMP: Yes, sir. I think the Supreme Court's case  
10      law also shows us that, again, going back to *Caulder v. Bouldt*,  
11      that an increase in punishment applied retrospectively violates  
12      ex post facto principles within this same due process right.

13              THE COURT: I understand those general principles,  
14      Mr. Camp, but in applying the 2002 guidelines, the probation  
15      office found the guideline range to be 121 months to 151 months.  
16      If that's the case, then how is it that there is any contention  
17      that it is an ex post facto violation by increased punishment?

18              MR. CAMP: Because, one, the Court found some of those  
19      determinations to be wrong. Secondly, those determinations were  
20      only made, probation was suggesting --

21              THE COURT: I don't know that -- which particular ones  
22      did I find in error? I think they were one of two.

23              MR. CAMP: The Court rejected the suggestion that there  
24      should be a cross reference to assault with intent to commit  
25      murder. The Court, on the other hand, did find the four level



1 upward adjustment in 2k2.1b5, and added that adjustment.

2 THE COURT: Now, my memory is that we came out at the  
3 same point, although we may have arrived at it through different  
4 calculations.

5 MR. CAMP: I think it was close, certainly, yes, Your  
6 Honor.

7 THE COURT: Well, however -- well, go ahead, Mr. Camp.

8 MR. CAMP: Judge, I don't mean to bore the Court with  
9 law that I know the Court understands, but I --

10 THE COURT: You are not boring me. I'm just trying to  
11 figure out if the guideline calculations, applying the 2002  
12 guidelines, provide for a sentence of 121 months, then how could  
13 the sentence that the government is advocating now of 121 months  
14 present a situation that there is an increase in punishment in  
15 violation of the ex post facto law?

16 MR. CAMP: Because what Blakely and Justice Stevens'  
17 part of the Booker opinion tell us is that the maximum sentence  
18 for constitutional purposes is that sentence based on either  
19 jury finding or facts admitted during the plea colloquy by a  
20 defendant. And no other.

21 THE COURT: Well, the Court sentence in this case was  
22 based upon facts admitted by the defendant as part of the plea  
23 colloquy. That's the reason I made this particular observation  
24 with respect to page 22, because there was a reference that  
25 somehow he wasn't intending to hurt anybody. And this argument

1 did appear to the Court to be marginally supported by the facts,  
2 this white car theory for his action.

3 MR. CAMP: Judge, I think where this comes into play is  
4 that Mr. Smith has never admitted intending to take any action  
5 against anyone inside of that school.

6 THE COURT: I'm sorry, Mr. Camp. You argued that the  
7 last time. I didn't believe it last time; I don't believe it  
8 now.

9 MR. CAMP: Your Honor doesn't believe it. So the Court  
10 is engaging in fact-finding, which Blakely and --

11 THE COURT: Based upon page 22, the defendant was,  
12 quote, observed pointing a rifle from a vehicle in the direction  
13 of the Sherith Israel school, end of quote. That is a fact that  
14 he admitted to, that he did not question the accuracy of, and he  
15 admitted was accurate.

16 MR. CAMP: It was out the window in the direction  
17 towards which was that building. That's what this says.

18 THE COURT: No, sir. It's pointing a rifle from the  
19 vehicle. That was a fact admitted as part of the plea colloquy.

20 MR. CAMP: Yes, sir. And as Mr. Smith has explained to  
21 the Court, and as the defendant has stated, there was no intent  
22 to harm anyone at the school. It was not pointed --

23 THE COURT: First of all, he didn't testify at  
24 sentencing.

25 MR. CAMP: Mr. Smith filed a statement which was made a

1 part of the record.

2 THE COURT: Does that establish it as evidence?

3 MR. CAMP: I believe it does. It has been accepted by  
4 the Court as his statement. Hearsay is admissible in a  
5 sentencing hearing, as was put in through the government's  
6 proof. Hearsay, double and triple hearsay.

7 Beyond that, Your Honor, I don't think even this mere  
8 fact establishes that there was -- would support the four level  
9 enhancement under 2k2.1b5, which enhancement was argued by the  
10 government and probation to be applied against counts two, three  
11 and four, not against count one. And this fact is relevant as  
12 to count one. Any fact beyond what Mr. Smith admitted to or was  
13 proven to a jury, which we didn't have, cannot be used under  
14 Blakely, and Justice Stevens' opinion in Booker, to enhance his  
15 sentence.

16 THE COURT: But under Booker, and under the Sixth  
17 Circuit precedent after Booker, I still have to consider, for  
18 the purposes of advisory guidelines, whatever evidence is put  
19 before the Court to determine that guideline.

20 Now, that is the Court's understanding of the law.  
21 Booker only made a change with respect to the mandatory aspects  
22 of it, and Justice Stevens' opinion that you are pointing to  
23 reflected the mandatory features of the then-existing  
24 guidelines. Those don't exist anymore.

25 I am now back to making an advisory determination, and

1 I still have to go through the calculus and the proof that I  
2 would consider before Booker on what the guideline sentence  
3 would be.

4 Now, whether that -- I mean, the difference is that  
5 they are now advisory. But I, nonetheless, have to consider the  
6 proof and make determinations under the guidelines like I did  
7 before Booker. If I don't, then the sentence gets reversed  
8 because I didn't apply -- didn't make the appropriate guideline  
9 determinations.

10 MR. CAMP: And I believe that the Court can do just  
11 that, subject to the Supreme Court's constitutional law and due  
12 process, which limits the extent upward to which the Court can  
13 go. And I suggest to the Court that that --

14 THE COURT: well, if I can't go upward, then it seems  
15 to me that you are basically eliminating the enhancement  
16 provisions for the guidelines.

17 MR. CAMP: I think as to those defendants whose  
18 sentence fell within those guidelines, I think if Mr. Smith's  
19 actions fell within Booker, we wouldn't be having this  
20 discussion.

21 THE COURT: No, I think we would still be having the  
22 discussion.

23 MR. CAMP: The fact in this case, Judge, is that the  
24 Blakely decision told us that the maximum applicable sentence in  
25 this case is 57 months. When the remedial Booker decision comes

1 down --

2 THE COURT: That assumes that the enhancement was not  
3 based upon facts admitted as part of the plea.

4 MR. CAMP: Yes, sir, that is our position.

5 THE COURT: If the enhancements were made based upon  
6 the facts that were admitted at the plea, there would be no  
7 issue.

8 MR. CAMP: Well, I don't agree with the Court on that.

9 THE COURT: But that's my understanding of the law.  
10 Unless admitted to by the defendant or found by the jury. So if  
11 you consider facts that were admitted by the defendant, and  
12 those facts are the basis for the enhancement, the application  
13 of the enhancement don't pose any Booker problems, because he  
14 has admitted those facts.

15 MR. CAMP: Well, we still don't go over 57 months, Your  
16 Honor.

17 THE COURT: What you're saying is that the enhancement  
18 can't be applied. If the enhancement can't be applied, I can't  
19 apply the guidelines. If I can't apply the guidelines, then  
20 what you are telling me is I can't do what the Sixth Circuit has  
21 said I have to do, and that is, apply the guidelines.

22 MR. CAMP: What the Court must do in any sentencing  
23 case is always subject to the law, both statutory and the  
24 Supreme Court. In this case, the due process places certain  
25 limitations, I suggest to the Court, on what can be done here.

1           And this is caused by this, in my experience, solely  
2 unique decision in which one faction of the Supreme Court writes  
3 part of the opinion, and the dissenters to that part of the  
4 opinion write the remedial part of the decision. I don't know  
5 of another case where that has happened. That's part of the  
6 problem here.

7           THE COURT: That may be part of the problem, but the  
8 Sixth Circuit has resolved that issue. They have told us  
9 exactly what we have to do. We have to make a determination  
10 under the guidelines, and if we don't make a determination under  
11 the guidelines, then the judgment that we entered is going to be  
12 reversed.

13           So I have got to apply the guidelines. And if I do  
14 apply the guidelines, I think I have to apply all of the  
15 applicable guidelines. And what you seem to be saying to me is  
16 that, under Booker, I can only apply the first set of guidelines  
17 for the base level offense, and I have to ignore enhancement,  
18 and I don't think that's what the Sixth Circuit has said.

19           MR. CAMP: What I'm telling the Court, the defendant's  
20 position is that any enhancements not based on facts at the time  
21 of the plea cannot be imposed. That if they are facts within  
22 the statement of facts that the defendant has admitted to beyond  
23 a reasonable doubt, those can certainly be used consistent with  
24 the Court's opinion.

25           But that beyond that, this Court cannot go, without

1 violating due process principles of ex post facto, by increasing  
2 Mr. Smith's sentence in an unconstitutional manner, in a manner  
3 that could not have been done under Blakely.

4 Blakely says that 57 months is the highest. Then to go  
5 beyond that, to --

6 THE COURT: The Supreme Court made it clear in Blakely,  
7 did they not, that it was expressing no opinion with respect to  
8 the United States sentencing guidelines. Blakely was a state  
9 case.

10 MR. CAMP: Yes, sir, that's true.

11 THE COURT: So the only case that is controlling here  
12 is Booker.

13 MR. CAMP: The clear principle in Blakely was that the  
14 maximum sentence for --

15 THE COURT: Whatever the clear principle was, the  
16 Supreme Court made it clear it wasn't applying it to the  
17 sentencing guidelines until it actually decided the case.

18 MR. CAMP: And that principle was adopted in Justice  
19 Stevens' decision in Booker, part of the opinion.

20 THE COURT: Well, that may not be true in Booker --  
21 well, never mind. Go ahead, Mr. Camp.

22 MR. CAMP: The Supreme Court has noted in Griffith v.  
23 Kentucky that the defendant is to receive the benefit of new  
24 rule of law, which in this case would have been Blakely and  
25 Booker, which were released while Mr. Smith's appeal was

1 pending, his direct appeal.

2 I suggest to the Court that Mr. Smith is entitled to  
3 the benefit of both Blakely and Booker constitutional rulings as  
4 well as the Court's due process case law on ex post facto. A  
5 similar example can be found in Marx v. United States in which  
6 the Court said any constitutional principle enunciated in Miller  
7 which would seek to benefit petitioners must be applied in their  
8 case.

9 This situation is the same, and it's unique because of  
10 the timing in which Mr. Smith's case came up. But I submit to  
11 the Court, as I noted earlier, that any factor beyond what was  
12 admitted at the time of the plea cannot be used to increase his  
13 sentence.

14 The Court is certainly free to impose whatever sentence  
15 the Court feels appropriate within those constitutional  
16 guidelines, both of the --

17 THE COURT: But in your argument, then, the guidelines  
18 become mandatory.

19 MR. CAMP: I'm saying, Your Honor, for an individual  
20 whose case was pending at the time Blakely was decided, and the  
21 Booker, Justice Stevens' Booker decision adopting Blakely  
22 rationale which says the maximum sentence for the law is the  
23 high end of the guidelines, that that is the maximum sentence  
24 that can be imposed.

25 THE COURT: Okay. But I can't even consider -- that's



1 the only sentence I can impose, under your theory?

2 MR. CAMP: No, sir. That's the highest sentence you  
3 can impose.

4 THE COURT: It's the highest. So at that point I have  
5 to ignore the other part of the guidelines, don't I?

6 MR. CAMP: The Supreme Court's -- my position is --

7 THE COURT: Yes or no?

8 MR. CAMP: The Supreme Court's case law on due process  
9 mandates that.

10 THE COURT: A yes or no would help me. A yes or no  
11 would help. Are you saying to me that, under your  
12 interpretation of Booker, that I can only impose a sentence  
13 determined under the guidelines without reference to any other  
14 -- without reference to any enhancement? Is that your position?  
15 Yes or no?

16 MR. CAMP: No, sir, not without relation to any  
17 enhancements.

18 THE COURT: But you just told me that the maximum -- I  
19 can't rely upon any fact that wasn't admitted as part of the  
20 plea. Is that what I understood you to say?

21 MR. CAMP: Yes, sir.

22 THE COURT: And that under the facts of the plea, the  
23 maximum sentence under the guidelines before the enhancement was  
24 57 months.

25 MR. CAMP: I believe that sentence includes certain

1 enhancements that were a part of the facts admitted at the time  
2 of the plea. And I have set that calculation out in the  
3 position paper I filed with the Court. To go beyond that, for  
4 example, to the four level increase under 2k2.1b5, that was not  
5 a part of any of the facts admitted at the plea, and could not  
6 be imposed.

7 THE COURT: For the government?

8 MS. PHILLIPS: Your Honor, across the country, upon  
9 resentencing from Booker, there have been consistently sentences  
10 imposed that have applied all of the enhancements that the Court  
11 would find relevant. The reason for that has been, and that's  
12 occurred -- in the 10th Circuit there has been a law review  
13 article written, and actually, it was -- I'm sorry, an article  
14 written. It was entitled, The Booker Mess, by Michael W.  
15 McConnell. And it points out that 46 percent of all of the  
16 cases remanded for Booker, there was no change in the final  
17 sentence, while four percent they gave increased sentences. And  
18 that was in the 10th Circuit.

19 The reason that they were able to reapply the exact  
20 same sentence is because, when the guidelines were mandatory,  
21 pre-Booker, it's the whole mandatory nature of it.

22 And Justice Stevens, in his opinion, at 123 Supreme  
23 Court at 750, has said, and he was referring to the guidelines  
24 pre-Booker:

25 The guidelines as currently written, could be read as

1 merely advisory provisions that recommended rather than required  
2 the selection of particular sentences in response to differing  
3 sets of facts. Their use would not implicate the sixth  
4 amendment. We have never doubted the authority of the judge to  
5 exercise broad discretion in imposing a sentence within a  
6 statutory range. Indeed, everyone agrees that the  
7 constitutional issues presented by these cases would have been  
8 avoided entirely if Congress had admitted from the Sentencing  
9 Reform Act the provisions that made the guidelines holding  
10 binding on district judges. It is that circumstance that makes  
11 the Court's answer to the second question presented possible.  
12 For when a trial judge exercises his discretion to select a  
13 specific sentence within a defined range, the defendant has no  
14 right to a jury determination of the facts that the judge deems  
15 relevant. That allows the Court to apply any of the guideline  
16 factors that it finds under the guideline analysis, beyond a  
17 reasonable doubt or by a preponderance of the evidence.

18 And Justice Stevens, himself, said that.

19 MR. CAMP: Judge, if I might briefly. Justice Stevens  
20 goes on to say, however:

21 The guidelines as written, however, are not advisory;  
22 they are mandatory and binding on all judges.

23 It is that binding nature that the Court told us in  
24 Blakely sets the maximum sentence at whatever the high end of  
25 the range is. In Mr. Smith's case, that was 57 months. When

1 the Supreme Court in the Breyer part, the remedial part, of the  
2 Booker opinion, changed the nature of the guidelines from  
3 mandatory to advisory, they effectively increased the maximum  
4 sentence for Mr. Smith from 57 months to whatever it could be  
5 today, with advisory guidelines.

6 It is that judicial increase in the maximum sentence  
7 that we object to, and we say is the violation of due process.  
8 I'm not telling the Court that the Court cannot use the  
9 guidelines to impose the sentence. Certainly the Court can and  
10 should. What I do suggest is the Court cannot use the  
11 guidelines to the defendant's detriment in violation of his  
12 constitutional rights.

13 MS. PHILLIPS: Your Honor, the only thing that I would  
14 add is that this, again, -- and this is set forth in our  
15 position paper -- that nothing about Booker has increased the  
16 statutory range. All of the cases cited by the defense deal  
17 with increase in statutory range or making a substantive charge,  
18 giving it a penalty that it didn't have before.

19 Taking away the mandatory nature of the guidelines does  
20 nothing but allow the Court to do a calculation of the  
21 guidelines and make it advisory. And that applies to 3553(a)  
22 factors and sentence within the maximum statutory range and  
23 sentence within the maximum statutory range. The statutory  
24 range has not changed; the maximum is what it was before, and,  
25 therefore, there is no ex post facto problem, and there is no

1 due process problem.

2 MR. CAMP: But the statutory maximum, Your Honor, is  
3 exactly what is not the maximum. That's what the holding in  
4 Blakely and Booker was about. And in fact, if we look at the  
5 Supreme Court's law, Miller v. Florida told us that an increase  
6 in the guidelines, even by a matter of months, can be an ex post  
7 facto violation. In that case they were dealing with Florida  
8 state guidelines.

9 That principle, however, was later adopted into the  
10 U.S. Sentencing Guidelines manual into what has come to be known  
11 as the one book rule, to say we use the book currently in date  
12 unless there is an ex post facto problem. In that decision the  
13 Court was talking about sentencing issues and that impact.

14 Both Blakely and Booker have told us that the guideline  
15 range sets the maximum, regardless of the statutory maximum.  
16 There is a statutory maximum that's higher in Blakely than the  
17 sentence he could have received, but the Supreme Court found  
18 that was not the appropriate measure for purposes of the sixth  
19 amendment, nor is it here.

20 THE COURT: We'll be in recess for a few minutes.

21 (Recess.)

22 THE COURT: Ms. Phillips, I had some questions I wanted  
23 to ask you. There were some differences in the calculation of  
24 the guidelines by the government, probation office, and the  
25 ultimate findings of the Court. Out of an abundance of caution,

1 are there any inconsistencies between what the Court earlier  
2 found at the March 2004 sentencing and the government's proposed  
3 findings of fact in its docket entry 74?

4 MS. PHILLIPS: I don't believe there are any  
5 inconsistencies in that, Your Honor.

6 THE COURT: I didn't discern any, because the assault  
7 with intent to commit murder didn't appear to be part of the  
8 enhancement in this.

9 MS. PHILLIPS: That's correct.

10 THE COURT: And I think that's really the only  
11 difference we had.

12 MS. PHILLIPS: Right. I took the Court's findings  
13 regarding the guidelines and put it into this.

14 THE COURT: Okay. We'll be in recess.

15 (Recess.)

16 THE COURT: Are there any other matters, either side?  
17 The Court is going to first, as I stated earlier, adopt as  
18 factual findings in this matter the statements made at the time  
19 of the plea. The Court is also going to adopt the calculations  
20 that were made at the sentencing hearing and findings that were  
21 made at the sentencing hearings as reflected on docket entry  
22 number 59, page 87 through page 98; on page 127.

23 Second, the Court will incorporate and adopt the  
24 government's proposed findings of fact set forth in docket entry  
25 number 74. The Court also adopts the government's conclusions

1 of law and the calculation of the guideline ranges that are  
2 applicable to this case. And, therefore, finds that the  
3 criminal history category is I, the offense level is 30, and the  
4 guideline range is 98 to 121 months. And at this time, the  
5 Court will allow the defendant to address the Court, and at that  
6 point, I will make a decision concerning the Section 3553(a)  
7 factors.

8 MR. CAMP: May it please the Court, Mr. Smith does not  
9 wish to have any allocution.

10 THE COURT: All right. Mr. Smith, you have heard the  
11 statement of your counsel that you do not wish to address the  
12 Court. You understand you have the right to address the Court,  
13 but you have elected not to do so. Is that right, Mr. Smith?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: Is that what you want to do?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: All right. Based upon the absence of any  
18 proof to the contrary since the last hearing, the Court is going  
19 to adopt its earlier findings as well as the findings set forth  
20 in the government's proposed findings of fact under Section 1353  
21 that are set forth on pages seven through 13.

22 The Court, in summary, has considered the fact that the  
23 defendant had an extensive amount of firearms, that on the day  
24 of the offense that he was fully armed, that he had pointed the  
25 gun at the school, that the selection of the school was based on

1 his personal beliefs, that the children at this school were  
2 particularly young children who were in no position to  
3 appreciate any danger that they faced. The defendant has a  
4 history of antisemitic feelings, has expressed his interest in  
5 killing people.

6 There has not been any proof offered to change any of  
7 the factual predicates for the Court's sentence in this case.  
8 There has been no analysis or showing of a factual similarity  
9 between the Al-Uqaily case reflected in Government's Exhibit  
10 Numbers 1-A and 1-B beyond the sentence in that case was  
11 obviously based upon the presentence report and information.  
12 whatever that was available is not before this Court, so the  
13 Court is not really able to make an assessment as to what may  
14 have motivated the decision of the Court in that case.

15 Are you ready for the Court to impose sentence in this  
16 case, Mr. Smith?

17 THE DEFENDANT: (Defendant stands.) (Respite.)

18 THE COURT: Are you ready for the Court to impose  
19 sentence, Mr. Smith?

20 THE DEFENDANT: Yes, sir.

21 THE COURT: Okay. The Court imposes a sentence on  
22 count one of 60 months; on count two, 61 months; on count three,  
23 61 months; on count four, 61 months. The Court orders that  
24 counts two, three and four be served concurrently. By law, the  
25 sentence on count one and count two must be consecutive, for a



1 total sentence of 121 months.

2 The Court places you on supervised release for a period  
3 of three years on count two that would embrace the one year on  
4 count one and would be concurrent with three years on counts  
5 three and four. The Court will not impose a fine because you  
6 lack the ability to pay a fine. The Court imposes a special  
7 assessment of \$400.

8 Special conditions of your pretrial release are that  
9 you must participate in a mental health program as directed by  
10 health officials in the Bureau of Prisons. The Court will  
11 strongly recommend that you be given access to the most  
12 intensive health treatment program available within the Bureau  
13 of Prisons.

14 You are prohibited from having any association or  
15 contact with the Sherith Israel School. You are to avoid all  
16 contact with the following groups: The Ku Klux Klan, the  
17 National Alliance or the Aryan Nation.

18 You are prohibited from owning, carrying, or possessing  
19 a firearm, destructive device or any other dangerous weapon.  
20 The Court has placed you on the maximum period of supervised  
21 release because the Court believes that, given the nature of  
22 this offense, given the references to your emotional history,  
23 that it is for the protection of yourself and others.

24 If you wish to appeal this sentence, you have ten days  
25 from today in which to do so. You will receive credit on this

1 sentence for all prior time that you have already spent in  
2 custody.

3 Are there any other matters?

4 MS. PHILLIPS: No, Your Honor. I just want to be  
5 clear, and I think you said it, but just for the record, the  
6 advisory guideline provisions that you have applied -- are they  
7 the same as set forth in the government's position?

8 THE COURT: Yes. I adopted the government's  
9 calculation of the guideline calculations.

10 MS. PHILLIPS: Thank you.

11 THE COURT: Thank you. Which I understand are wholly  
12 consistent with the Court's earlier calculation of the  
13 guidelines.

14 MS. PHILLIPS: I believe so.

15 MR. CAMP: Your Honor, pursuant to United States v.  
16 Bostick, I understand that the Court of Appeals directs me to  
17 restate for the record any objections that we may have had,  
18 despite the Court's ruling on those objections.

19 So, pursuant to that decision, I would note that we  
20 object to any sentence above 57 months as violative of due  
21 process and ex post facto, as we earlier discussed in this  
22 hearing.

23 We object to the guideline calculations proposed by the  
24 government and adopted by the Court. The defendant filed a  
25 defendant's resentencing position paper at document 72-1,

1 setting forth what the defendant believed were the correct  
2 sentencing guideline calculations, which would have resulted in  
3 a total offense level of 23 before the reduction for the two  
4 level downward departure.

5 Implicit in that is an objection to and rejection of  
6 the government's calculation of the guidelines.

7 Defendant objects to the factual findings and  
8 conclusions of law submitted by the government for the reasons  
9 stated in defendant's submission of document 77-1 in the record,  
10 defendant's objections to government's proposed findings of fact  
11 and law, as not being supported by the record in this case.

12 If I could have just a moment, Your Honor.

13 That's all, Your Honor. Thank you.

14 THE COURT: I just want the record to be clear that  
15 with defense counsel's statements that I have adopted the  
16 findings, as I said earlier, what those findings are, are the  
17 findings that the Court made at the time of the original  
18 sentence, which I think are consistent with the guidelines  
19 applicable to this case, that the guidelines have been treated  
20 as advisory only, and because of that, the Court does not feel  
21 that any of the ex post facto contentions or violations that  
22 defense counsel asserts should be present here.

23 Are there any other matters?

24 MS. PHILLIPS: No, sir.

25 THE COURT: We'll be in recess, after which we will

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take up the next case.

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1 REPORTER'S CERTIFICATE

2 I, Peggy G. Turner, Official Court Reporter for  
3 the United States District Court for the Middle  
4 District of Tennessee, with offices at Nashville, do  
5 hereby certify:

6 That I reported on the Stenograph machine the  
7 proceedings held in open court on May 1, in the matter of  
8 USA v. SMITH, Case No. 3:02-00018; that said proceedings in  
9 connection with the hearing were reduced to typewritten form by  
10 me; and that the foregoing transcript, pages 1 through 29, is a  
11 true and accurate record of said proceedings.

12 This the 26th day of June, 2006.

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17 S/Peggy G. Turner, RPR  
18 Official Court Reporter  
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